

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-6116

To be Argued by
LLOYD CONSTANTINE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

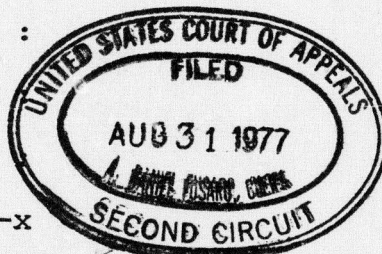
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VERONICA JONES and ROBERT JONES, on :
behalf of themselves and all other :
persons similarly situated, :

Plaintiffs-Appellants, :

-against- :

JOSEPH A. CALIFANO, Secretary of Health, :
Education and Welfare; :
BERNICE L. BERNSTEIN, Director Region II: :
Department of Health, Education and :
Welfare; and :
JOSEPH J. KELLY, Commissioner Social :
Security Administration, New York :
Region, :

Defendants-Appellees.
-----x



ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS

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PREFACE

This is an appeal from an order and judgment of Judge Kevin T. Duffy of the United States District Court for the Southern District of New York. The decree, entered June 8, 1977, denied plaintiffs' motions for summary judgment and class certification and dismissed their complaint.

Judge Duffy granted appellants' application to prosecute this appeal in forma pauperis in an order entered on July 28, 1977. Plaintiffs' motion to dispense with an appendix and to proceed on the original record was granted by this Court in an order entered August 1, 1977. This order required that the plaintiffs would file four copies of the portions of the record they will rely upon. Citations in this brief are to these record portions which have been renumbered R-1 - R-89. For example, the lower court's decision pages 1-8 are renumbered R-1 - R-8. Plaintiffs' complaint is R-11 - R-52 etc. A reference to paragraph 1 of plaintiffs' complaint would be (Compl. ¶ 1, R-11). An index to this numbering system appears as Addendum B to this brief and is also contained in the copies of the separately bound record portions.

QUESTIONS PRESENTED

1. Did the Court below err in finding that it had no jurisdiction over the claims of the named plaintiffs and their class under 42 USC Section 405(g)?

2. Did the Court below err in finding that it had no jurisdiction over the claims of the named plaintiffs and

their class under 28 USC Section 1361?

3. Did the Court below err in denying plaintiffs' motion for class certification?

4. Is this case moot?

STATEMENT OF THE CASE

This action for declaratory and injunctive relief arising under subchapter XVI of the Social Security Act, 42 USC §1381 et seq. and 28 USC §2201, was commenced in the United States District Court for the Southern District of New York on October 13, 1976. Plaintiffs alleged that jurisdiction was conferred on the district court by 42 USC §1383(c)(3) and 28 USC §1361. Plaintiffs Veronica and Robert Jones sue on behalf of themselves and all similarly situated recipients of and applicants for Supplemental Security Income ("SSI") who have or will receive deficient initial SSI payments by virtue of defendants' use of an illegal method for computing retroactive SSI benefits. Defendants are officials of the Department of Health, Education, and Welfare and the Social Security Administration who promulgated and enforce this illegal method of computing benefits.

Plaintiffs moved for class certification on December 10, 1976 and for summary judgment on February 11, 1977. Defendants moved for dismissal of the complaint on January 12, 1977. In an opinion dated May 5, 1977 Judge Duffy found that plaintiffs' substantive claim was "meritorious and not disputed" by defendants, but that he was "constrained" by the "state of

the law" to hold that the Court was without jurisdiction to entertain this claim. (Dec. p. 8, R-8).

A judgment and order denying plaintiffs' motions for summary judgment and class certification and dismissing their complaint was entered on June 8, 1977. (R-9) Notice of Appeal to this Court was filed on July 17, 1977. This Court has jurisdiction of plaintiffs' appeal pursuant to 28 USC §§1291 and 1292.

STATEMENT OF FACTS

Supplemental Security Income ("SSI") is the nation's cash assistance program for needy persons who are also disabled, blind, or aged. SSI is administered by the Social Security Administration ("SSA") pursuant to subchapter XVI of the Social Security Act ("the Act"). 42 USC §1381 et seq. For claimants determined eligible, entitlement to SSI benefits commences with the month of application. 42 USC §1382(c)(2). Therefore, SSI claimants determined eligible for benefits in a month subsequent to the month in which they applied are entitled to retroactive benefits for the period between application and acceptance ("SSI determination period").

A claimant determined eligible for SSI who received Aid to Families with Dependent Children ("AFDC") during the SSI determination period is entitled to the relevant SSI payment level less the amount of AFDC received during this period. 42 USC §1382(b). This case involves the legality of defendants' procedures for computing and paying retroactive SSI benefits

to claimants who transferred from New York's AFDC program into the SSI program.

Plaintiff-appellant Veronica Jones is a disabled recipient of SSI who received AFDC from January to June 1976, the period when SSA was determining her eligibility for SSI. In June 1976 SSA determined that Ms. Jones was eligible for SSI retroactive to January 1976, the month she applied. During the SSI determination period Ms. Jones and her two children received \$348.50 monthly in AFDC payments.* When she began receiving SSI she was removed from the AFDC grant. This change in June 1976 caused a \$57.50 monthly decrease in the AFDC grant. Had she been receiving SSI from January 1976 on, the monthly AFDC grant paid to her children would have been reduced by this amount of \$57.50.

In computing the retroactive SSI benefits due Ms. Jones for January to June 1976, SSA attributed her with one-third of the \$348.00 monthly AFDC grant, or \$116.00, rather than the \$57.50 that her inclusion in the grant accounted for. This is in accordance with SSA's "per-capita method" of AFDC income attribution. SSA Program Circular No. 74-27 Item No. 6 (11/19/74) (Compl. Ex. C, R-39). Because of this overstatement of attributable AFDC income, Ms. Jones was not paid any retroactive SSI benefits for January to June 1976.**

*Her husband, plaintiff Robert Jones, has received SSI since 1974.

**The exact dollar computations and the complicated SSA procedures which caused the overstatement of Ms. Jones' AFDC income to adversely affect her husband's SSI payments are fully explained at paragraphs 30-53 of the complaint (R-19 - R-25).

The Jones requested a reconsideration from SSA, contending that only \$57.50 monthly AFDC income was legally attributable to Veronica. SSA affirmed its decision in a reconsidered determination, again applying the challenged "per-capita method." (Complaint Ex. A, R-37).

Plaintiffs-appellants' class is comprised of two sub-classes. The first sub-class are SSI recipients who, like Veronica Jones, previously received AFDC and received reduced retroactive SSI benefits, or none at all, because of SSA's use of the per-capita method of AFDC income attribution. The second sub-class are AFDC recipients who have applied for SSI, are awaiting SSA's determination, and if eligible will receive reduced retroactive SSI benefits because of SSA's pro-forma use of the "per-capita method" in New York.

This appeal comes before this Court more than 20 months after SSA's own Appeals Council rendered two decisions holding that defendants' use of the challenged "per-capita method" of AFDC attribution was improper under the Act. These decisions required defendants to compute and pay retroactive SSI benefits in accordance with the "incremental method" mandated by 42 USC §602(a)(24) and urged by plaintiffs herein.

In re Luz Gonzalez (3/29/76) (Compl. Ex. D, R-41); In re Irma R. (2/18/76) (Compl. Ex. E, R-44).

None of these procedures or computations were disputed in this suit. The sole dispute concerns the legality of SSA's "per-capita method."

Counsel for appellants herein also represented Luz Gonzalez and Irma R. whose cases were legally indistinguishable from plaintiffs' In the 18 months since the Gonzalez and Irma R. decisions, counsel have consistently petitioned SSA to come into compliance with these rulings of its own Appeals Council. SSA has refused to conform its procedures. See Compl. Exs. "F" & "G", R-49, R-51. During these 18 months many more SSI recipients, including the Jones, were paid illegal and deficient retroactive SSI benefits.

On July 25, 1977, eight days after notice of appeal was filed in this case, an Administrative Law Judge of the SSA rendered a decision fully favorable to the named plaintiffs. This decision again adopted the "incremental" method urged by counsel in Gonzalez, supra, Irma R., supra and the instant case. In re Veronica Jones (July 25, 1977) R-86. However, the defendants continue to pay retroactive SSI benefits to all other persons similarly situated in accordance with the "per-capita method" alleged to be illegal in this case, and held to be improper in the three administrative decisions cited above.

POINT I

THE COURT BELOW ERRED
IN FAILING TO FIND JURIS-
DICTION UNDER 42 USC SECTION
405(g)

The district court had jurisdiction over the claims of the named plaintiffs and their class under 42 USC §405(g).

Section 405(g) is made applicable to claims arising under subchapter XVI of the Act by 42 USC §1383(c)(3).*

In Weinberger v. Salfi, 422 U.S. 749 (1975), and more recently in Mathews v. Eldridge, 424 U.S. 319 (1976), the Supreme Court clarified the conditions which must be satisfied to obtain judicial review under §405(g). Eldridge explained that the central requirement that there be a final decision by the Secretary of HEW after a hearing consisted of two elements, i.e., a "non-waivable" element that a claim for benefits shall have been presented to the Secretary, and a "waivable" element that the administrative review procedures prescribed by the Secretary be exhausted. 424 U.S. at 328-330.

It is undisputed that the "non-waivable" element had been fulfilled by the named plaintiffs (Dec. p. 6, R-6) and every member of their class. The Jones not only presented a claim for benefits to the Secretary but also exhausted the "reconsideration" procedure of administrative review, receiving a second adverse ruling prior to filing their complaint.

*42 USC §405(g) in relevant part provides:

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow.

(Compl. Ex. A, R-37; Affidavit of Stephen Casella, R-73, 15).

Each class member has also presented the Secretary with a claim for SSI benefits. Members of one sub-class have been determined eligible for SSI but deprived of retroactive benefits they are entitled to because of defendants' illegal procedures. Members of the second sub-class have presented the Secretary with claims for SSI benefits which are being determined by SSA. If determined eligible, they are assured of deficient retroactive benefits because of defendants' illegal procedure. If determined ineligible for SSI, they drop out of the class.

With regard to the "waivable" element of exhausting the Secretary's administrative review procedures, Eldridge held that the Secretary could waive or a court could construe a waiver against an unconsenting Secretary to insure justice in a given case. The Secretary refused to waive exhaustion in Eldridge, 424 U.S. at 330. Indeed Eldridge did not even go through reconsideration, a review procedure exhausted by the Jones prior to filing suit.*

The court below found plaintiffs' failure to exhaust fatal to their invoking §405(g) jurisdiction. Reasoning that the Secretary was considering a revision of the challenged procedure, Judge Duffy found "no reason to deny the agency 'an opportunity to correct its own errors.'" (Dec. p. 8, R-8). The facts, however, compel the conclusion that the Secretary has consistently and knowingly refused to correct his own

*Examination of the record in Salfi discloses that the Secretary also refused to waive exhaustion in that case. See Salfi, dissenting opinion of Justice Brennan, 422 U.S. at 801.

errors, has used his administrative review procedures as a tool to moot the claims of named litigants, and has been blatantly dishonest with the district court.

In October 1975 counsel for plaintiffs-appellants herein filed Gonzalez v. Mathews, 75 Civ. 5270 (S.D.N.Y.), a purported class action challenging SSA's "per-capita method" of AFDC attribution on the identical grounds raised in the instant case. SSA's position was that Gonzalez must exhaust the administrative review procedures. Gonzalez exhausted during the pendency of the district court action and received a favorable decision from SSA's Appeals Council, the agency's highest administrative tribunal. In re Luz Maria Gonzalez (3/29/76) (Compl. Ex. D, R-41) In that decision the Appeals Council held that SSA's use of the "per-capita method", challenged herein, was improper under the Act.

One month prior to its decision in Gonzalez, the Appeals Council issued an almost identical ruling: In re Irma R., (2/18/76) (Compl. Ex. E, R-44) As in Gonzalez the Appeals Council ruled that the "per-capita method" was inconsistent with the Act. Counsel for appellants herein also represented Irma R. On the assumption that SSA would bring its procedures into conformity with these rulings, counsel stipulated to discontinue the Gonzalez case in the Southern District.

Counsel made several requests to SSA that it comply with the Gonzalez and Irma R. decisions. SSA responded that

its Appeals Council decisions had no precedential value and were determinative of the rights of the named parties only. (Compl. Exs. F & G, R-49, R-51).

In October 1976, the instant case was filed in the court below. The government did not defend on the merits but represented to the court that a change in its procedures was imminent, and as in Gonzalez, contended that plaintiffs could not invoke §405(g) jurisdiction because they had not exhausted beyond the reconsideration stage of administrative review.

In dismissing plaintiffs' complaint, Judge Duffy relied heavily upon defendants' representations concerning an imminent change in its procedures. (Dec. P. 8, R-8).

However, the imminent change which defendants waived before the court was no change at all. The proposed change would substitute New York State's finding of the attributable share of AFDC for SSA's pro-forma use of the "per-capita method." (Aff. of Barbara Spivak ¶s 3-7, R-70, 71). Defendants did not inform Judge Duffy that it had already solicited New York's opinion and learned that New York would also pro-forma attribute a "per-capita" (pro-rata) share of AFDC, leaving the illegal procedure in effect. Plaintiffs obtained a copy of New York's letter to HEW disclosing this fact. (Plaintiffs' statement pursuant to local rule 9(g), Ex. A, R-83).

Judge Duffy dismissed plaintiffs' complaint relying heavily upon SSA's proposed amendment, which he knew would

leave the challenged procedure unchanged. Given Judge Duffy's clear indication that plaintiffs would succeed if the merits were reached (Dec. P. 8, R-8), his dismissal is incomprehensible.

While SSA was urging the district court to dismiss plaintiffs' complaint in reliance upon its sworn statement of an imminent change in the challenged procedure, SSA was instructing its New York district offices to continue using the "per-capita method" pending the outcome of the New York district court case challenging that same procedure. Counsel received evidence of this fact recently when a client challenging the "per-capita method" at reconsideration* received an adverse reconsidered determination which in its entirety states:

"The original determination on your SSI benefit rates in the retroactive period is affirmed.

New York State's official position is that each family member has equal needs and therefore, benefits equally from the AFDC grant. We have been instructed to consider that an individual's income is his per capita share of the grant. The fact that the grant is not reduced proportionately when the family size is reduced is irrelevant.

There is a case pending in a Federal Court in New York in which the plaintiff contends that the AFDC income should be the amount by which the grant is reduced. There have been no results from this Court action as yet."

*This client is a member of the purported class.

A copy of this reconsidered determination with names deleted is annexed hereto as Addendum "B". SSA urged the district court to dismiss because a change was imminent while it told its local offices that any change would await the action of the district court.

On July 25, 1977 an Administrative Law Judge of the SSA issued a hearing decision favorable to the Jones, once again disapproving SSA's use of the challenged "per-capita method". This decision, rendered eight days after counsel filed Notice of Appeal in the instant case, continues defendants' practice of mooting the claims of individual litigants at advanced stages of administrative review, while instructing local offices to continue using the illegal procedure.

Defendants have refused to amend a procedure held illegal by SSA's own Appeals Council more than 18 months ago. Their proposed amendment would leave the challenged procedure in effect. They have used their administrative review procedures to moot the claims of individual litigants and invade the jurisdiction of the district court. They have been dishonest with the court below.

The lower court refused to waive complete exhaustion of administrative review so that the agency would have an opportunity to "correct its own errors." (Dec. P. 8, R-8)

*A copy of this decision, In re Veronica Jones is included in the record portions filed by appellants although it was not before the district court. The decision has also been annexed in retyped form for legibility. See R-86 - R-89.

The soundness of Judge Duffy's jurisdictional holding must be weighed in the light of the agency's reprehensible conduct.

The court below indicated that it would have waived complete exhaustion of administrative review and found jurisdiction under §405(g) had plaintiffs' claim been constitutional rather than statutory.* (Dec. P. 6, 7, R-6, 7). This mechanical interpretation of when a district court must waive exhaustion is both incorrect as a matter of law and unsound as a matter of policy.

Although Salfi and Eldridge involved constitutional claims, neither decision indicates that the presence of a constitutional claim will automatically trigger a waiver of exhaustion. To the contrary, Eldridge stressed that the decision on waiver required an ad hoc contextual analysis of the factors militating for and against waiver:

Decisions in different contexts have emphasized that the nature of the claim being asserted and the consequences of deferment of judicial review are important factors in determining whether a statutory requirement of finality has been satisfied. The role these factors may play is illustrated by the intensely "practical" approach which the Court has adopted.....
422 U.S. at 331 Note 11.

*Judge Duffy noted that plaintiffs' claim is "nominal-ly constitutional" in that it is grounded in defendants' alleged violation of the Supremacy Clause. (Dec. P. 7, R-7).

The "intensely practical" approach adopted by the court implicitly rejects the wholly mechanical approach adopted by Judge Duffy.

The lower court's reliance on Califano v. Sanders, 97 S. Ct. 980, 986 (1977) to support its mechanical approach to waiver is misplaced. Sanders is inapposite as it concerned a claimant's attempt to obtain judicial review of the Secretary's refusal to afford him a 42 USC §405(b) hearing, whereas the Jones seek to avoid the Secretary's insistence that they submit to such a hearing. The dictum in Sanders, 97 S. Ct. at 986, explaining the waivers of exhaustion in Salfi and Eldridge in terms of the constitutional claims raised therein, is no more than a recognition that such claims are by their nature unsuited to resolution in an administrative forum. The presence of a constitutional claim is merely one factor in determining whether to waive, as the above quote from Eldridge clearly shows.

There is an important practical consideration which militates this Court's rejection of the lower court's mechanical approach to waiver of exhaustion in 405(g) cases. If the mere statement of a colorable constitutional claim triggers a waiver of exhaustion, it will be simple for litigants to contrive such claims and append them to their real statutory claims. This Court must be painfully aware of the time consuming charade which takes place in this Circuit in cases brought under 28 USC §1343, where a contrived constitu-

tional claim is plead so that the district court may find pendent jurisdiction over the "real" statutory claim. See Hagans v. Lavine, 415 U.S. 528 (1974).

Defendants' use of their exhaustion requirement as a device to invade the jurisdiction of the district court, and continue its illegal practice with impunity, has been documented by plaintiffs beyond dispute. This Court must reject the lower court's incompr ensible indulgence of the defendants' bad faith and its mechanical approach to waiver of exhaustion. The lower court had jurisdiction over the claims of plaintiffs and their class under 42 USC §405(g).

POINT II

THE COURT BELOW ERRED IN FAILING TO FIND JURISDICTION UNDER 28 USC SECTION 1361

The district court had jurisdiction over the claims of the named plaintiffs and their class under 28 USC §1361. The lower court dismissed plaintiffs' reliance on §1361 in a footnote indicating that the failure to exhaust administrative review procedures would preclude invoking mandamus jurisdiction. (Dec. P. 5 footnote, R-5). Plaintiffs have elsewhere addressed the issue of exhaustion (pages 7-13 , surpa), and will confine their discussion to the arguments raised by defendants below.

There has never been any dispute as to the eligibility of plaintiff Veronica Jones to receive SSI benefits. She was receiving these benefits prior to the commencement of

this suit, as were members of one sub-class. The second sub-class, awaiting SSA's eligibility determinations, remain class members only if they are found eligible for SSI. Once the defendants exercise their discretionary powers in determining eligibility under subchapter XVI, they are obligated to perform the purely ministerial function of paying benefits in accordance with the mandate of the Act. Defendants have failed to discharge this wholly ministerial duty owed to plaintiffs. 28 USC Section 1361 is appropriate to compel performance of such a duty mandated by statute. Mattern v. Weinberger, 519 F.2d 150, 157 (3rd Cir. 1975); Jackson v. Weinberger, 407 F.Supp. 792, 796 (W.D.N.Y., 1976).

The district court need not have determined that the right asserted by plaintiffs did in fact exist prior to assuming jurisdiction under 28 USC Section 1361. Mattern v. Weinberger, supra, 519 F.2d at 157; Frost v. Weinberger, 515 F.2d 57, 62 (2nd Cir., 1975). As stated in Jackson v. Weinberger, supra:

. . . the question of Section 1361 jurisdiction depends on whether or not the plaintiffs' charges can be substantiated, and the determination of plaintiffs' charges turns on a finding of jurisdiction. One requisite presupposes another. To avoid this degenerating into a catch-22 abyss, we interpret Section 1361 to permit an assumption of jurisdiction in these circumstances. Citations omitted, 407 F.Supp. at 796.

Defendants' assertion that 42 USC §405(h) bars mandamus jurisdiction over plaintiffs' claims is without merit.* Section 405(h) does not apply to claims involving subchapter XVI of the Act (SSI). Mathews v. Eldridge, supra; and Weinberger v. Salfi, supra, which interpreted Section 405 (h), involved subchapter II claims. Section 405(h) by its terms applies to subchapter II, the OASDI programs, and by specific reference applies to aid programs under subchapter XVIII of the Act. With reference to subchapter XVIII, 42 USC §1395 ii provides that:

The provisions of Sections 406 and 416(j) of this title, and of subsections (a), (d), (e), (f), (h), (i), (j), (k), and (l) of Section 405 of this title [42 USC Section 405(a), (d), (e), (f), (h), (i), (j), (k), (l)] shall also apply with respect to this subchapter [XVIII] to the same extent as they are applicable to subchapter II of this chapter. Emphasis added.

*42 USC §405(h), §205(h) of the Act provides:

The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

The specific incorporation of §405(h) into subchapter XVIII is in stark contrast to the unambiguous failure to incorporate §405(h) into subchapter XVI (SSI), while specifically incorporating other subsections of 42 USC §405. 42 USC §1383 (d)(1), (subchapter XVI), states:

The provisions of Section 407 of this title and subsections (a), (d), (e), and (f) of Section 405 of this title shall apply with respect to this part to the same extent as they apply in the case of subchapter II of this chapter.

Section 405(h) has no application to subchapter XVI. Accord Maher v. Mathews, 402 F.Supp. 1165, 1173 note 30 (D. Del. 1975).

Even if §405(h) applied to the SSI program, it would not preclude mandamus jurisdiction in the instant case. This is true for two reasons.

First, §405(h) was enacted more than 20 years before 28 USC §1361 and could not have been intended by Congress to bar jurisdiction under subsequently enacted statutes. This fact was most recently noted by the Ninth Circuit in Elliot v. Weinberger, No. 74-1611 (July 1, 1977):

Nor does any clear and convincing evidence exist that Congress intended to limit mandamus jurisdiction at all by §405(h). Section 1361 did not exist when §405(h) was enacted in 1935 precluding jurisdiction under section 41 of Title 28 for recovery of Social Security claims. [Footnote omitted] In at least one other instance where

Congress intended a statutory limitation to encompass §1361, a specific amendment to the limiting statute was made. [38 USC §211(a) (1970), amending 38 USC §211(a) (1958); 2 US code, Cong. & Admin. News, at 3729-31 (1970)]

Elliot supra slip opinion at p. 11.

Footnote 12 of Mathews v. Eldridge, supra, 424 U.S. at 332, clearly shows that the Court has not determined the issue of §405(h)'s effect on mandamus jurisdiction over subchapter II claims. See White v. Mathews, No. 77-6015 (2nd Cir. July 18, 1977) slip opinion at 4720.

In Califano v. Sanders, 97 S.Ct. 980 (1977) the Supreme Court implicitly rejected the governments reflexive contention that §405(h) relegates social security claimants seeking judicial review to the jurisdiction afforded by 42 USC §405(g). In Sanders, social security claimants argued that the Administrative Procedure Act ("APA") provided jurisdiction over their claims challenging the Secretary's refusal to reopen their applications. If §405(g) were the sole jurisdictional predicate for social security claims, the Supreme Court would not have had to reach the question of whether the APA provided an independent grant of subject matter jurisdiction. It borders on the frivolous to suggest, as defendants have, that the Supreme Court would settle a famous jurisdictional question, debated for more than 30 years, i.e., whether the APA was jurisdictional, in a case where the resolution of that question was unnecessary.

When the Seventh Circuit decided Sanders it held that 42 USC §405(h) did not limit judicial review to those methods "expressly authorized" by the Act itself. Sanders v. Weinberger, 522 F.2d 1167, 1169 (7th Cir., 1975). Justice Brennan's opinion for the Court did not utter one word in criticism of this holding. Rather it was held that the APA was not jurisdictional.

The concurring opinion of Justices Burger and Stewart argues, as defendants do, that 42 USC §405(h) precludes judicial review except where jurisdiction exists under §405(g). 97 S. Ct. at 987. This minority opinion is quite clearly an attack on the rationale of the Court's opinion in Sanders.

The second reason why §405(h) does not bar mandamus jurisdiction in this case was recently explained by this Court in White v. Mathews, No. 77-6015 (July 18, 1977). In White this Court held that §405(h) did not preclude §1361 jurisdiction where the plaintiffs were not seeking review of the Secretary's determination as to their eligibility for benefits. (Slip opinion at P. 4721). Similarly, plaintiffs herein are not seeking review of a determination as to their eligibility. Plaintiff Jones and one sub-class were determined eligible for SSI prior to commencement of this suit. The second sub-class remain class members only if determined eligible for SSI by the Secretary. As in White, plaintiffs herein seek to compel the defendants to perform a purely ministerial function. In White the source of the mandate was the Constitution. In

the instant case a specific statutory directive mandates that the Secretary pay benefits in a specific manner, after he has exercised his discretionary functions in the determination of eligibility.

Section 405(h) does not apply to the SSI program (subchapter XVI). If §405(h) did apply to subchapter XVI, it would not bar jurisdiction under the subsequently enacted Mandamus Act. Even if §405(h) barred mandamus jurisdiction to review an eligibility determination, it would not preclude jurisdiction over plaintiffs' claims.

POINT III

THIS CASE IS NOT MOOT

Defendants will undoubtedly contend that this case is now moot because the JONES have received a favorable hearing decision ending their individual controversy with SSA. However, the facts of the instant case are almost identical to White v. Mathews, No. 77-6015 decided by this Court on July 18, 1977.

In White, SSA mooted the claim of the named plaintiff by affording him a hearing some three months prior to the district court's order certifying a class. On the authority of Sosna v. Iowa, 419 U.S. 393, 402 N. 11 (1975)*. This Court

*Sosna held that under appropriate circumstances class certification could not only revert back to the filing of the class motion, but to the filing of the complaint. 419 U.S. at 403 note 11.

held that class certification should revert back to the filing of the class motion, reasoning that:

There is, however, no question that White had alleged a substantial controversy when he filed suit in January 1975, and nothing had changed his position when he moved for class certification in March of that year. The existence of a controversy at that point was sufficient, on the facts of this case, to enable this suit to proceed as a class action....

Slip opinion at P. 4723

This Court also expressed concern that:

Refusing to do so [allow class certification to revert back] would mean that the SSA could avoid judicial review by the simple expedient of granting hearings to plaintiffs who seek, but have not yet obtained class certification. . . . We do not suggest that this occurred here, but we must take notice of the reality of that possibility in the future.

White, slip opinion at Page 4723.

A concern more prophetic of the exact circumstances of the instant case can hardly be imagined. A live controversy still exists as to all unnamed class members. Each named litigant has had their claim mooted out by SSA while it otherwise continues the challenged practice.*

Plaintiffs filed their motion for class certification in December 1976, eight months prior to SSA mootng the Jones

supra. *These undisputed facts are documented at pages 8-12,

individual controversy. Although Judge Duffy denied plaintiffs' motion for class certification, his decision leaves little doubt that he was convinced that the requirements of Rule 23 had been fulfilled.* The denial of class certification follows from the lower court's ruling that it had no jurisdiction over the individual or class claims because of the failure to exhaust. Each time a named litigant has exhausted, SSA has mooted that individual claim. If the lower court's jurisdictional holdings were erroneous, as plaintiffs' contend, the case should be remanded with instructions to certify a class effective the date the class motion was filed.

POINT IV

THE COURT BELOW SHOULD
HAVE CERTIFIED A CLASS

Plaintiffs moved for class certification on December 10, 1976. The class was defined as all:

"recipients of Aid to Families
with Dependent Children in New
York State past and present who
have filed applications for SSI
and

(A) were determined eligible
for SSI but paid a deficient
initial SSI grant for the
months during which their
application was being pro-

*The essential class allegations set forth in plaintiffs' statement pursuant to local rule 9(g) were not disputed by defendants, and are deemed admitted in accordance with that rule. See plaintiffs' 9(g) statement, ¶ 21, 23, R-81.

cessed, because SSA attributed them with a greater portion of their family's AFDC grant than was legally permissible, and deducted these overstated amounts from their retroactive SSI payment,

(B) are now awaiting the determination of their SSI applications.

Although Judge Duffy denied plaintiffs' motion for class certification without stating any reasons, it is clear that the denial followed from his finding that the Court had no jurisdiction over the individual or class claims. There is no dispute that the requirements of Rule 23(a), (b)(2) F.R.C.P. have been fulfilled. The contention central to a class determination in this case is that the challenged "per-capita method" of AFDC income attribution has been uniformly applied by SSA since the inception of the SSI program in January 1974, and continues to date. This is a material fact not in dispute, as it was made in plaintiffs' statement pursuant to local rule 9(g) (R-81) and was not refuted by defendants.

Plaintiffs will not restate the facts constituting compliance with Rule 23(a), (b)(2) which are set forth in plaintiffs' complaint (R-13) and their memorandum of law in support of the class motion. However, plaintiffs should note that the class consists of many thousands of SSI beneficiaries and applicants who presently or previously received AFDC in New York State. There has never been any dispute that this

class has the requisite numerosity and present common issues of law and fact making class relief appropriate. Defendants' documented practice of mootng the claims of named litigants, while continuing to apply the "per-capita method" to all other members of the purported class, makes class relief absolutely essential.

POINT V

DEFENDANTS' "PER-CAPITA
METHOD" OF AFDC INCOME
ATTRIBUTION VIOLATES 42 USC
SECTION 602(a)(24)

There is simply no doubt that plaintiffs will prevail if this case is allowed to proceed to the merits. Defendants did not even attempt to defend against plaintiffs' substantive claim in the court below. Judge Duffy's decision clearly evidences his conviction that plaintiffs were correct on the merits. Each time a named litigant has proceeded to an advanced stage of administrative review, the claims raised herein have been completely vindicated. (In Re Irma R., R-44, In Re Luz Gonzalez, R-41, In Re Veronica Jones, R-86). However defendants continue to process all other claims in an illegal manner.

Secretary Califano has violated his statutory duty to compute and pay SSI benefits in the manner mandated by the Act, and violated his duties under the Act to promulgate procedures to be followed by local SSA District Offices which will accurately take into account §402(a)(24) of the Act, 42 USC

§602(a)(24), in their administration of the SSI program.*

In response to 42 USC §602(a)(24) the Social and Rehabilitation Service of HEW issued a Program Instruction, APA-PI-74-8, on December 20, 1973 (R-84) which instructed local public assistance authorities to compute "need, income, resources, and amount of assistance payment... [in the AFDC program] as though the SSI beneficiary was not present in the home."

Pursuant to that instruction from HEW and the plain language of §602(a)(24), both federal and New York State courts have repeatedly held that an SSI recipient must be treated as if he were invisible in computing AFDC. Nelson v. Likins, 389 F.Supp. 1234 (D. Minn. 1974), aff'd 510 F.2d 414 (8th Cir. 1975); Duval v. Philbrook, CCH Pov. L. Rep. Paragraph 23,145 (D. Vt. 1976); Barton v. Lavine, 50 A.D.2d 350, 389 N.Y.S.2d

*42 USC Section 602(a)(24) requires that a State Plan for AFDC shall provide that:

if an individual is receiving benefits under subchapter XVI [SSI] of this chapter, then for the period for which such benefits are received, such individual shall not be regarded as a member of a family for purposes of determining the amount of the benefits of the family under this subchapter [AFDC] and his income and resources shall not be counted as income and resources of a family under this subchapter.

416 (App. Div. 3d Dept., 1976); Cf. Barton v. Lavine, (different case than Barton cited above) 38 N.Y.2d 785 (1975), 381 N.Y.S.2d 867, cert. denied sub nom. Berger v. Barton, 96 S. Ct. 2191 (1976) (holding that the statute was in effect in 1973 and requiring invisibility as to subchapter XVI recipients in that year also).

In New York, pursuant to advice from HEW, all local social services districts have been required by the New York State Department of Social Services to completely disregard the presence of an SSI recipient in computing AFDC since October 16, 1974. N.Y. St. Dept. of Social Services Administrative Letter 74 ADM-151, Oct. 16, 1974. Prior to that Administrative Letter, New York had been disregarding the SSI recipient for computing the basic needs allowance under its public assistance programs, but had continued to consider the SSI recipient's presence in computing the shelter allowance portion of its public assistance grants. Under the October 16, 1974 policy, the SSI recipient is now disregarded entirely in computing public assistance benefits in New York. The courts of New York have uniformly held that the absolute disregard of the SSI recipient in computing AFDC payments was required for all of 1974, not just once the state acceded to HEW's demands that it comply with 42 USC §602(a)(24). Schimmel v. Reed, 50 A.D.2d 1085, 377 N.Y.S.2d 313 (App. Div. 4th Dept. 1975), aff'd on other grounds 40 N.Y.2d 887 (1976); Barton v. Lavine, 50 A.D.2d 350, 389 N.Y.S.2d 416 (App. Div. 3d Dept.

1976); Peterson v. Berger, 84 Misc. 2d 517, 377 N.Y.S.2d 887 (Sup. Ct. Albany Co. 1975).

The effect of 42 USC §602(a)(24) on the interrelationship between the SSI program and the AFDC program has been recognized, albeit belatedly, by SSA* in the Luz Gonzalez and Irma R. Appeals Council decisions (R-41, R-44) and the named plaintiff's hearing decision, In re Veronica Jones, *supra*. (R.-86). These decisions fully adopt the contentions made by plaintiffs in the instant case. They recognize that AFDC grants are computed on an individual basis, i.e., the removal of one person from an AFDC grant does not result in an automatic pro-rata reduction of the grant, but a reduction of a less than pro-rata increment.

For example, in In re Luz Gonzalez, (R-41), the AFDC family of 4 was receiving \$390 per month for most of the months at issue. Once Gonzalez became an SSI recipient the AFDC grant was recomputed for a family of 3 and became \$332 per month. Had a simple pro-rata reduction ("per-capita" in SSA jargon) been used to redetermine the AFDC grant it would have been reduced by 1/4 or \$97.50 to \$292.50 per month; instead it became \$332 per month. See also In re Irma R., (R-44), the 2 person grant of \$310 per month effective August, 1974, was

*Insofar as both the Social Security Administration, which administers SSI, and the Social and Rehabilitation Service, which supervises AFDC, are both under the purview of the Secretary of HEW, this case is a classic example of one hand not knowing what the other is doing.

not simply halved to \$155 once the claimant became eligible for SSI, but was computed as a single person grant of \$225. Once plaintiff Veronica Jones became an SSI recipient the AFDC grant for the Jones' family was reduced by only \$57.50 rather than the pro-rata one-third (amounting to \$116.00) used by SSA.

The removal of the SSI claimant from the AFDC grant does not result in a simple pro-rata reduction of the AFDC payments because of the structure of AFDC grants and the method of computing same. In New York the AFDC grant is the sum of two components, a basic allowance and a shelter allowance. N.Y. Social Services Law §131-a; 18 NYCRR §§352.2, 352.3. Neither component, nor the total, increases in direct relation to the number of persons included in the AFDC family. Rather there is a relatively large grant level for a single person with declining increments for each additional person.* Similar grant structures obtain in other states. See, e.g. Larson v. Dept. of Social and Health Services, CCH Pov. L. Rep. Paragraph 21,870 (Wash. Ct. App. 1975).

All of this material was called to the attention of the Appeals Council in the case of Irma R. and their decision

*The basic allowance is \$94 for one person, \$150 for two, \$200 for 3, etc. N.Y. Social Services Law Section 131-a (3). Thus the incremental amount attributable to the addition of one person to a two person grant is actually \$50; under a pro-rata method it would be erroneously overstated as \$66.67. In the case of shelter allowances the incremental increase is even less, and in many cases there is no increase. 18 NYCRR Section 352.3.

supports its correctness. Indeed, SSA admitted that the incremental method adopted by the Appeals Council "does appear to have merit in certain situations" and advised counsel for plaintiffs that they planned to propose rules "to take into account the method used by the Appeals Council" (Compl. Exs. F & G, R-49, R-51). Although the Social Security Administration so advised on July 28, 1976 it still has not promulgated any new procedures. Moreover, SSA specifically stated that they would only act prospectively. Id. Once again, before the lower court, SSA promised to promulgate new procedures. (Aff. of Barbara Spivak ¶ 5-7, R-70, 71). However, the changes which defendants indicated were imminent would leave the illegal "per-capita method" in effect in New York, as is fully explained at page 10 supra.

The problem is acute. Some 11 percent of AFDC families nationwide have an SSI recipient living with them. 118 Cong. Rec. 17030 (Oct. 5, 1972). Despite the incorrectness of blindly pro-rating without regard to the actual state of affairs, SSI Claims Manual, §12340.1, and Regional Program Circular no. 74-27 Item no. 6 (Compl. Ex. C, R-39) continue in effect and continue to require District Offices to pro-rate the AFDC grant in computing SSI benefits and eligibility. These are the "operating procedures of the Social Security Administration", which were disapproved in the two Appeals Council decisions (R-41, R-44). The problem is that they are still in effect, 18 months after the Appeals Council first

recognized their illegality in the Irma R. case.

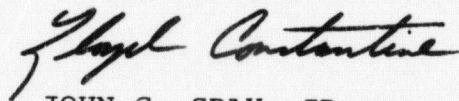
The defendants are openly violating the law while they brazenly contend that the courts are without jurisdiction to enjoin their behavior.

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing plaintiffs' complaint and denying their motion for class certification should be reversed in all respects and remanded for entry of a judgment granting plaintiffs class certification, summary judgment, and declaratory and injunctive relief, consistent with plaintiffs' prayer for relief.

Dated: August 31, 1977
Brooklyn, New York

Respectfully submitted,



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ADDENDUM A

Supplemental Security Income Notice of Reconsideration

From: Department of Health, Education, and Welfare

Social Security Administration 111 W. Huron St. to NY 11212

Date: June 3, 1977

Claim Number:

Reconsideration Filed:

4/5/77

Dear Ms. Sutton:

The original determination on your SSI benefit rates in the retroactive period is affirmed.

New York State's official position is that each family member has equal rights and therefore, benefits equally from the AFDC grant. We have been instructed to consider that an individual's income is his per capita share of the grant. The fact that the grant is not reduced proportionately when the family size is reduced is irrelevant.

There is a case pending in a Federal Court in New York in which the plaintiff contends that the AFDC income should be the amount by which the grant is reduced. There have been no results from this court action as yet.

A-1

Important: See other side for an explanation of your appeal rights and other information

ADDENDUM B

RECORD

In accordance with the Order of this Court dated August 1, 1977, plaintiffs-appellants have compiled and photocopied the parts of the record they have relied upon in their brief. Four copies of this "record" are filed with the Court and a copy is being served on counsel for the opposing parties.

The pages of the original documents have been re-numbered as follows:

Renumbered Pages

Opinion of the Honorable KEVIN T. DUFFY, May 5, 1977.....	R-1 - R-8
Order and Judgment Appealed from, entered June 8, 1977.....	R-9 - R-10
Plaintiffs-Appellants' Complaint with exhibits.....	R-11 - R-52
Plaintiffs-Appellants' Notice of Motion for Class Certification and Supporting Affidavit.....	R-53 - R-60
Defendants-Appellees' Answer.....	R-60 - R-66
Defendants-Appellees' Notice of Motion to Dismiss the Complaint and Supporting Affidavits.....	R-67 - R-73
Plaintiffs-Appellants' Notice of Motion for Summary Judgment and Statement Pur- suant to General Rule 9(g) of the United States District Courts for the Southern and Eastern Districts of New York with exhibit.....	R-74 - R-83

RECORD (cont'd)

Renumbered Pages

Department of Health, Education and
Welfare, Social and Rehabilitation
Service, Program Instruction, APA-PI-
74-8, December 20, 1973, Exhibit "A" to
Plaintiffs -Appellants' Memorandum of
Law in Support of Motion for Summary
Judgment..... R-84 - R-85

Decision of Social Security Administration
Bureau of Hearings and Appeals in In re
Veronica Jones, July 25, 1977 (retyped for
legibility)..... R-86 - R-87

Original photocopy of In re Veronica
Jones..... R-88 - R-89

②
COPY RECEIVED

Robert B. Fuchs Jr.
UNITED STATES ATTORNEY

8/3/77
Marian F. Bryant

